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the choice of having no militia or one unprotected by constitutional guarantees. The net result is that the old sort of militia, known to the Constitution, is to be done away with.

THE PROPOSED MODEL STATUTE ON INSANITY AND CRIMINAL RESPONSIBILITY. — The revolution of the social conception of insanity, together with the recognition that it is a disease rather than a bedevilment,¹ has led to a demand for more humane and scientific methods of dealing with insane offenders. Accordingly, the Institute of Criminal Law and Criminology, at last summer's meeting, approved a model statute intended to define criminal responsibility in its relation to insanity with a view of substituting for the rule of *M'Naghten's Case*² a test more in accord with contemporary theories. Section 1, the gist of the proposed statute, provides that "No person hereafter shall be convicted of any criminal charge, when at the time of the act or omission alleged against him, he was suffering from mental disease and did not have by reason of such disease the particular state of mind which must accompany such act or omission in order to constitute the crime charged." The test thus laid down is open to numerous objections. It neglects entirely the important and steadily growing class of crimes in which a specific intent is unnecessary. Under the statute those who have a mania for purchasing lottery tickets, for dispensing liquors to minors, or for frequenting gambling dens and brothels would be unable to plead insanity and would apparently be sent to prison instead of to an insane asylum. Nor would the statute cover statutory rape committed by insane offenders. Inasmuch as the criminal law of the future will be greatly concerned with cases in which a particular state of mind is unimportant, the statute is not comprehensive enough for a model act.

It is difficult to see wherein the proposed legislation would materially change the existing legal situation.³ The section adequately states the

¹ The supernatural view of insanity persisted as late as 1862. In *State v. Brandon*, 8 Jones (N. C.) 463, the court said: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one. . . . If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it against all supernatural agencies." In the same year (1862) the Lord Chancellor of England declared in the House of Lords that "the introduction of medical theories into the subject has proceeded on the vicious principle of considering insanity as a disease." HANSARD, DEBATES, 1st series, clxv, 1297.

² 10 Cl. & Fin. 200.

³ At present the states may be divided into three groups. The first is composed of those in which the rule of *M'Naghten's Case* has been adopted as the complete statement of the law. This is true in the federal as well as in the following state courts: Ark., Cal., Del., Id., La., Me., Minn., Miss., Mo., Neb., N. J., Nev., N. Y., N. C., Okla., Ore., S. D., Tenn., Va., Wis., Ga. (but see *Flanagan v. State*, 103 Ga. 619) and Tex. (but see *Harris v. State*, 18 Tex. Cr. App. 287). Wrong is in many cases understood to mean morally wrong. *U. S. v. Guiteau*, 10 Fed. 161; *People v. Schmidt*, 216 N. Y. 324. See 29 HARV. L. REV. 538.

In the second group the effect of insanity on the emotions and will is recognized and the so-called irresistible impulse test is added to the knowledge test. This test was first used by Chief Justice Shaw in *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500, and by Chief Justice Gibson in *Commonwealth v. Mosler*, 4 Barr (Pa.) 266. It has been followed in Conn., Ia., Ky., Mont., and Ohio.

The third group leaves it all to the jury whether, as a matter of fact, responsibility

sound rule that an insane delusion may eliminate knowledge of "the nature and quality of the act" and so prevent the necessary mental element. But an insane delusion of this sort is a species of the genus mistake of fact, and excuses on that ground. What the section fails to cover is the "irresistible impulse" case, the case, that is, where the power of choice is negated by the mental disorder; in more scientific terms, where the ratio between impulse and inhibition is abnormal. This is a material omission. If this is not a true analysis of the meaning of the statute, the fact that it is a reasonably possible analysis makes the proposal unsatisfactory as model legislation.

The statute, according to its authors, will introduce the doctrine of partial responsibility, *i. e.*, the holding of lunatics for part of their crimes. It would seem to lead to the result that the law would establish a barometric scale of states of responsibility divided into as many grades as there are degrees of insanity.⁴ As has been pointed out, a "phrenometer," which will penetrate into the human soul and fix the exact degree of mental malady, has not yet been invented. To admit such partial responsibility is to make concessions to a science of the past where partial insanity was recognized. The creation of a class who would be held responsible in part only would lead to faulty results, for when conflicting evidence of alienists is introduced there will be danger of a compromise by the jury, and either a prisoner who is responsible will receive too light a punishment or one who ought to escape altogether will be condemned.

The truth is that for reasons that have been becoming increasingly clear with the development of knowledge about mental things, it is as yet impossible to crystallize any scientifically correct test into a rule of law which shall be comprehensive and precise. But if we consider that cases must be decided, and by juries, some general rule of approximate applicability becomes indispensable. The incompleteness as such a rule of section 1 of the present statute follows from what has been said. Previous rules, though less precise, were more complete. For all previous rules required knowledge of the "nature and quality of the act," thus covering the ground of section 1. The "irresistible impulse" cases supply the element of power of choice. *M'Naghten's Case*, by the moral flavor of its test, gave juries an excuse to hang only the right men. The best solution lies then not in a new rule, but in a new jury. And if a jury of experts is made impossible of proposal by the improbability that

does or does not exist. The criterion of legal responsibility is the existence of a causal connection between the mental disease and the crime. This test has been adopted in N. H. (*State v. Jones*, 50 N. H. 369), Ala. (*Parsons v. State*, 81 Ala. 577, 2 So. 854), Ill., Ind., Kan., Mich. See OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, 78-80.

⁴ This method has been followed in Greece. GREEK PENAL CODE, 1835, ART. 87, provides: "If it clearly and unambiguously appears from all the circumstances, that owing to any of the states of mind specified in the previous article (Art. 86) the intellectual powers are not completely abolished, but nevertheless substantially disturbed and weakened to such an extent that from such cause, the condition for the application of full punishment provided by law to be inflicted is not present, the punishment shall be reduced, the reduction being in proportion to the deviation from the normal standard of responsibility found to exist in each case."

Utah recognizes the doctrine of partial responsibility in *State v. Anselmo*, 148 Pac. 1071.

any legislature could or would adopt it,⁵ the next best course is to assure expert and impartial advice to the jury of inexperts. This is what the committee has done in its additional bill relating to expert testimony.⁶ One of the chief abuses of the insanity plea has been the partisanship of such testimony. The very essence of scientific testimony should be its disinterestedness, and the statute, by allowing the court to call in its own experts, takes a step in the proper direction. It is, however, to be regretted that the final draft of the statute omits provisions for the establishment of psycho-pathological wards⁷ where the accused may be observed pending trial, for only such a provision could lead to a thorough knowledge of the case. It must be remembered that the expert is called on as a rule to testify not to the present mental condition of the accused, but to his mental state at the time of the alleged crime, which is usually several months past.⁸ On the whole the administrative features of the statute do not make as radical a change as one might desire, probably for

⁵ As to the unconstitutionality of a jury of experts, see THAYER, *PRELIMINARY TREATISE ON EVIDENCE*, 94, where various cases are collected in which juries of various sorts of experts have been used. Indeed, a jury of experts would be to-day in a very real sense a modern revival of the ancient jury of the vicinage. Neighbors were summoned because they were wise through propinquity; experts are summoned because they are wise through study and education. We are going back to a demand for special knowledge in the jury, reacting from the mischievous search for impartiality in ignorance.

⁶ "Sec. 1. *Summoning of Witnesses by Court.* Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

Sec. 2. *Written Report by Witnesses.* When the issue of insanity has been raised in a criminal case, each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either party before being read to the jury, if request for this is made to the court by counsel. If the witness presenting the report was called by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense."

⁷ An earlier draft of the statute had provided that: "Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before whom the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides."

⁸ See Dr. White in 4 J. CRIMINAL LAW AND CRIMINOLOGY, 106.

fear that a stronger statute would never be adopted, or perhaps would be held unconstitutional.

Other sections of the statute provide useful reforms for dealing with persons who are acquitted because of insanity.⁹

RECENT CASES

ADMIRALTY — JURISDICTION OF COURT OF A NEUTRAL COUNTRY TO DECREE RESTITUTION OF PRIZE MADE IN BREACH OF THAT COUNTRY'S NEUTRALITY.

INTERNATIONAL LAW — RIGHT TO SEQUESTERATE PRIZES IN NEUTRAL PORTS — IMMUNITY OF SHIP FROM SUIT BECAUSE OF FOREIGN SOVEREIGN'S INTEREST. — The *Appam*, which had been lawfully taken as prize by a German man-of-war, was brought into Hampton Roads by a prize crew, who asked that the ship be interned until the end of the war, claiming a right of such internment under a treaty. While the Secretary of State was still considering the application for internment, the British owners filed libels in the United States District Court to recover possession of the ship and cargo. The court decreed the restitution. *The Appam*, 234 Fed. 389 (U. S. Dist. Ct., E. D., Va.).

For a discussion of this case, see NOTES, p. 161.

ADMIRALTY JURISDICTION — POWER OF A STATE COURT TO DECREE THE SALE OF A VESSEL. — Plaintiffs are the minority owners of a vessel and are dissatisfied with the employment thereof by the majority owners. An accounting, the appointment of a receiver, the sale of the vessel, and a division of the proceeds ratably amongst the part owners are sought by the plaintiffs in a State court. *Held*, that the U. S. district courts have exclusive jurisdiction to give the relief sought. *Fisher v. Carey*, 159 Pac. 577 (Cal.).

The Constitution provides that "The Judicial power [of the United States] shall extend . . . to all Cases of Admiralty and Maritime Jurisdiction." Art. III, § 2. The Judiciary Act gives to the district courts original jurisdiction in all civil admiralty cases, reserving to suitors in all cases the remedies of the common law where it is competent to afford relief. U. S. COMP. STAT. 1913, § 991 (3). Manifestly, this Act was not intended to, and no act of Congress can, detract from the jurisdiction left in the State courts by the Constitution. It is to the Constitution, therefore, that one must go to ascertain whether equitable relief, such as is desired in a suit for partition and sale, may be

⁹ "Sec. 2. When in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was mentally diseased at the time when he did the act or made the omission charged, then if the jury before whom such person is tried concludes that he did the act or made the omission charged, but by reason of his mental disease was not responsible according to the preceding section, then the jury shall return a special verdict that the accused did the act or made the omission charged against him but was not at the time legally responsible, by reason of his mental disease.

Sec. 3. When such special verdict is found, the court shall remand the prisoner to the custody of [the proper officer] and shall immediately order an inquisition by [the proper persons] to determine whether the prisoner is at that time suffering from a mental disease so as to be a menace to the public safety. If the members of the inquisition find that such person is mentally diseased as aforesaid, then the judge shall order that such person be committed to the state hospital for the insane, to be confined there until he shall have so far recovered from such mental disease as to be no longer a menace to the public safety. If they find that the prisoner is not suffering from mental disease as aforesaid, then he shall be immediately discharged from custody." The two bills, and the report of the committee recommending them, may be found in 7 J. CRIMINAL LAW AND CRIMINOLOGY, 484.